85-649

No. .....

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 1414, and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

JOHNNY WARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

1. Does the claim of an injured longshoreman under the Longshoremen's and Harbor Workers' Compensation Act, 29 U.S.C. §§905(b), 933 arise under the laws of the United States within the meaning of 28 U.S.C. §1441(b), so as to be removable to federal court without regard to the citizenship of the parties?

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 1414, and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

JOHNNY WARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, International Longshoremen's Association, AFL-CIO (ILA), and its Local 1414, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled case on July 18, 1985.

Opinions Below

The opinion of the court of appeals is reproduced as Appendix A to this petition (1a-4a). The opinions of the district court are reproduced as Appendix B and Appendix C to this petition (5a-6a, 7a-13a).

Jurisdiction

The judgment of the court of appeals was entered on July 18, 1985. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Statutes Involved

Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §905(b).

> In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act [33 USCS §933], and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies

against the vessel except remedies available under this Act.

28 U.S.C. §1441(b).

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Statement of the Case

Respondent Johnny Ward is a longshoreman who was seriously injured while working aboard the vessel M/V *Oswego Planter*. Ward instituted suit in the State Court of Chatham County, Georgia seeking personal injury and other compensatory damages under the provisions of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§905(b), 933 and Georgia State Law.[1] Ward named as defendants Firestone Tire & Rubber Co., the parent company of the owner of the vessel, Oswego Latex Carrier Corp., Georgia Ports Authority, which operates the port facilities, and the Savannah Maritime Association, a multiemployer bargaining association representing longshore employees in the Port. Ward also joined as defendants Petitioners Local 1414, International Longshoremen's Association, and the International Longshoremen's Association, AFL-CIO ("ILA"), the international union with which Local 1414 is affiliated.

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[1] Ward's wife brought an action for loss of consortium and other damages.

Both actions were removed to the United States District Court for the Southern District of Georgia, Savannah Division by a removal petition filed by the ILA on June 17, 1983. At the time that the actions were removed to the district court, there was also pending before United States District Court Judge Edenfield an action for exoneration from or limitation of liability which had been filed by the owners and charterers of the *Oswego Ranger*. The action for exoneration or limitation had been filed pursuant to the Limitation of Liability Act, 46 U.S.C. §282, *et seq.* The removed actions were assigned to Judge Edenfield as cases related to the pending limitation action.

Judge Edenfield proceeded first to a trial of the limitation action. Ward and his wife appeared as claimants in the limitation case and sought to prove that the vessel owner and charterer were negligent. In his findings of fact after trial, Judge Edenfield rejected Ward's claims. The court found instead that the accident resulted directly from the operational negligence of Ward and his fellow employees, who failed to use the proper equipment while lowering the boom of the ship. Judge Edenfield's findings were affirmed in all respects by the United States Court of Appeals for the Eleventh Circuit. *L&C Marine Transport, Ltd.* v. *Ward,* 755 F.2d 1427 (11th Cir. 1985).

Although the Wards had previously moved to remand both actions to the state court, Judge Edenfield did not rule on the motion for remand until after the affirmance by the Eleventh Circuit in the limitation proceeding.[2] By order dated April 29, 1985, Judge Edenfield denied remand holding that an action under the LHWCA "arises under

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[2] Under 46 U.S.C. §185, if the shipowner tenders a bond equal in value to the owner's interest in the vessel and freight, "all claims and proceedings against the owner with respect to the matter in question will cease." Judge Edenfield apparently relied on §185 as authority for deferring consideration of the remand motion until after affirmance by this court in the limitation proceeding. See Appendix C at 9a-10a.

the laws of the United States" and is thus removable under 28 U.S.C. §1441(b). Appendix B at 6a. However, on May 21, 1985, while a motion for summary judgment was pending, the court *sua sponte* vacated its prior order and remanded the two actions. The basis for the court's decision was not that the case had been improvidently removed or that the court was without jurisdiction, but rather that the removal would result in plaintiff's being denied a jury trial:

> Persons bringing such common law actions in state court would be entitled to a trial by jury. In that connection, according to the explicit mandate of Congress in the "saving to suitors clause," plaintiffs must not be thwarted in their attempt to employ their common law remedies in state court, where a trial by jury may be obtained.

Appendix C at 13a.

The ILA, Local 1414, ILA and Savannah Maritime Association petitioned the United States Court of Appeals for the Eleventh Circuit for a Writ of Mandamus directing the district court to vacate its order of remand, and to proceed with the merits of the case.[3] The Eleventh Circuit denied the petition, finding that plaintiff's actions were essentially *common law* maritime negligence actions and, as such, under the "saving to suitors clause" of 28 U.S.C. §1333(1), the plaintiffs could pursue the common law remedy. The court rejected petitioners' contention that the 1972 amendments to the LHWCA created a federal cause of action, arising under the laws of the United States within the meaning of 28 U.S.C. §1441(b), so as to be re-

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[3] While 28 U.S.C. §1447(d) provides that an order remanding a case to a state court is not reviewable, the Supreme Court has imposed an important limitation on this provision. In *Thermton Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), this Court held that mandamus is available to review remand orders which are based on grounds other than those provided in §1447(c). *See also London* v. *M.S. Fire Insurance Co.*, 531 F.2d 257 (5th Cir. 1976).

movable without regard to the citizenship of the parties. Appendix A at 3a. It held that the district court's remand was proper.

Petitioners now seek a writ of certiorari to review that order.

Reasons for Granting the Writ

1. The Case Presents an Important Question as to Whether §905(b) of the Longshoremen's and Harbor Workers' Compensation Act Arises Under the Laws of the United States.

The writ requested herein should issue because the central question presented, namely whether an LHWCA claim is properly removable to the district court, is of critical concern to both management and labor in the longshore industry.

Despite efforts by labor and management to improve the safety of longshore operations, the large number of injuries and compensation claims led Congress to enact the 1972 amendments to the LHWCA. 33 U.S.C. §901, et seq., as amended. For the fiscal year 1984, the number of claims brought under the LHWCA totaled 152,073. In the calendar year 1983 alone, $320,408,600.00 in compensation and medical benefits was paid out for claims brought under the LHWCA. Employment Standards Administration, Annual Statistical Report: December 1984 at p. 3, January, 1985 at p. 1. Under the 1972 amendments, Congress has provided both an administrative and a judicial remedy to claimants. While Section 5(b) provides injured claimants with a judicial remedy, 33 U.S.C. §905(b), contested compensation claims are also heard by a federally appointed administrative law judge and reviewed by a three-member Benefits Review Board ("BRB"). The BRB's decisions are reviewable in the court of appeals. 33 U.S.C. §§919, 923. *See Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 254n.3 (1977). This provision for a dual remedy un-

derscores the extent and seriousness of the task of administering compensation for injury claims brought under the LHWCA.

In defining the standard of care applicable to defendants in §905(b) actions, a critical question is presented as to whether §905(b) is a federal cause of action and, thus, whether §905(b) claims are removable to federal court. In *Scindia Steam Navigation Co.* v. *Lauro De Los Santos,* 451 U.S. 156 (1981), this Court was called upon for the first time to consider the nature of an action under §905(b).

In *Scindia,* a longshoreman injured by a defective winch commenced an action under §905(b) against the vessel owner. The district court, relying on §§343 and 343A of the Restatement of Torts, granted summary judgment for the vessel.[4] The district court was of the view that the vessel could not foresee that the longshoreman would continue cargo operations, despite knowledge of the dangerous winch. Id. at 162. Thus, the district court in effect ruled that the longshoreman was contributorily negligent or assumed the risk of injury. The U.S. Court of Appeals for the Ninth Circuit reversed the granting of summary judgment to the vessel. In the opinion of the court of appeals, §§343 and 343A of the Restatement were improper measures of the shipowner's liability for negligence under §905(b) because those sections incorporated notions of contributory negligence and assumption of the risk that were inapplicable under the maritime law. According to the Ninth Circuit, the shipowner could be liable if it failed to exercise reasonable care to protect the longshoremen against danger. *Id.* at 163.

Although this Court affirmed the reversal of summary judgment, it disagreed with the Court of Appeals as to

[4] Under §§343 and 343A of the Restatement, an owner of land is not liable to invitees for harm caused by known dangers, unless he should expect that the invitee will not discover the danger or will not protect himself aaginst it. Id. at 161n.

the applicable standard of care. The Court stated that the shipowner had no general duty by way of supervision or inspection to discover dangerous conditions that develop during cargo operations. *Id.* at 172.[5] The Court stated that the definition of the vessel's negligence was to be resolved "through the application of accepted principles of tort law and the ordinary process of litigation." However, the Court found that the legislative history to §905(b) is unequivocal that, *"questions arising in §905(b) cases shall be determined as a matter of Federal law."* *Id.* at 165n. (Emphasis supplied).

Thus, while a federal court may look to established principles of tort law in deciding LHWCA cases, it is clear from *Scindia* that the law which will be created under §905 is federal law. The Eleventh Circuit's ruling that the 1972 amendments to the LHWCA did not create a federal statutory cause of action for negligence so as to make removal proper as a federal question under 28 U.S.C. §1441(b) is clearly inconsistent with *Scindia.* This court must resolve this inconsistency, in order to effectuate the Congressional intent that the federal courts develop and apply a uniform federal law of negligence in §905(b) cases.

Accordingly, this Court should grant certiorari to resolve the important question as to whether a claim brought under §905(b) of the LHWCA arises under the laws of the United States.

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[5] However, the Court was of the view that once the shipowner learns that a dangerous condition exists, there are circumstances in which he will have a duty to act. Id. at 176.

2. The Court Should Grant Certiorari to Resolve a Conflict Among the Circuits as to the Question of Whether a Claim Brought Under §905(b) of the Longshoremen's and Harbor Workers' Compensation Act Arises Under the Laws of the United States.

Notwithstanding the recent authoritative pronouncement from this Court in *Scindia Steam Navigation Co.* v. *Lauro De Los Santos, supra,* that §905(b) of the LHWCA establishes a new federal statutory cause of action, there exists a conflict between the Fifth and Third Circuits as to the federal nature of the statutory remedy. The Eleventh Circuit has now entered the conflict with its decision below.

The law in the Fifth Circuit is that §905(b) of the LHWCA did not create a new federal cause of action for third party negligence but merely preserved the existing right of an injured worker to recover damages from third parties in accord with nonstatutory negligence principles. *Bynum* v. *Patterson Truck Lines, Inc.,* 655 F.2d 643 (5th Cir. 1981); *Russell* v. *Atlantic & Gulf Stevedores,* 625 F.2d 71 (5th Cir. 1980).

The Third Circuit has taken a position in direct conflict to the Fifth Circuit's. *Griffith* v. *Wheeling Pittsburgh Steel Corp.,* 610 F.2d 116 (3d Cir. 1979), vacated on other grounds *sub nom. American Commercial Lines, Inc.* v. *Griffith,* 451 U.S. 965 (1981). In applying the standard of care imposed on vessel owners in §905(b) actions, that court recognized that Congress, in amending the statute in 1972, intended common-law negligence principles to be applied on a uniform national basis. *Id.* at 123. As stated by the court:

> [F]ederal courts may develop on a case by case basis a uniform federal law of negligence, referring for guidance to the land-based standards of care established in the Restatement (Second) of Torts whenever such reference accords with the Congressional intent and is helpful to decision of the case at hand.

Id. at 126.

Consistent with this Court's reasoning in *Scindia,* the Third Circuit has made it clear that the law which will be created under §905(b) is federal law. The significance of the conflicting treatment of §905(b) claims as federal or non-federal statutory causes of action is highlighted by the plethora of claims brought under this statute and the millions paid out annually in compensating those claims. Unless this Court makes a definitive ruling as to the federal nature of the statute, the conflict among the federal courts will continue and the Congressional goal for a uniform federal law of negligence will be frustrated.

This Court should grant certiorari to resolve the conflict among the circuits and to provide guidance to the federal judiciary as to whether §905(b) of the LHWCA arises under the laws of the United States.

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari be issued to review the order of the United States Court of Appeals for the Eleventh Circuit in this case.

Dated: October 15, 1985

Respectfully submitted,

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APPENDIX

Appendix A

Opinion of Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-8425

IN RE:

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 1414, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AFL-CIO, and SAVANNAH MARITIME ASSOCIATION,

Petitioners.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT FOR THE SOUTHERN DISTRICT OF GEORGIA

(July 18, 1985)

Before VANCE, HENDERSON and CLARK, *Circuit Judges.*

BY THE COURT:

The petition for a Writ of Mandamus directing the District Court to vacate its remand order is DENIED. The district court has remanded two negligence actions originally brought in the State Court of Chatham County, Georgia by plaintiffs Johnny Ward and Linda Ward as

husband and wife, seeking personal injury and other compensatory damages under the provisions of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), and relevant state law. These two actions were removed to federal court along with another action brought by certain defendants seeking exoneration or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. § 282, *et seq.* A bond was tendered in the limitation of liability proceeding, and an injunction was entered staying all other proceedings, including the above-referenced state court actions.

Upon the conclusion of the limitation of liability proceeding the district court remanded the previously enjoined negligence actions to the state court for proceedings on the merits. In its remand order the district court did not invoke the terms of 28 U.S.C. § 1447(c), which provides that the district court shall remand a case if it was "removed improvidently and without jurisdiction." Rather, the district court stated, "plaintiffs initially brought their claims in state court, and asserted individually their right to trial by jury, the Court is without power under the 'saving to suitors clause' to deny them this right in the federal forum."

Orders remanding a case to the state court are not reviewable on appeal or otherwise. 28 U.S.C. § 1447(d). A very narrow exception to this rule was created by the Supreme Court in *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), where the Court held that a writ of mandamus could issue where a district judge remanded a properly removed case on grounds he had no authority to consider under § 1447(c).

Our review of the district court order and the case sub judice leads us to conclude that the district court remanded the cause based upon the jurisdictional grounds stated in § 1447(c). First, we note that the failure by the district

court to track the specific language of § 1447(c) is not fatal to the validity of the order. *Division of Archives, History and Records Management, Department of State* v. *Austin*, 729 F.2d 1292, 1293 (11th Cir. 1984). *In re Weaver*, 610 F.2d 335, 337 (5th Cir. 1980). Moreover, this court has interpreted *Thermtron* "to be strictly limited to those cases in which a district court has clearly not relied upon § 1447(c) in ordering a remand." *In re Weaver*, 610 F.2d at 337.

Here, the district court based its remand order upon 28 U.S.C. § 1333(1), the "saving to suitors clause," which gives the federal courts exclusive jurisdiction over maritime matters, except in the case where the claimant has a viable common law remedy and opts to pursue that route. The two actions filed by plaintiffs in state court were essentially common law maritime negligence actions. Petitioners/defendants on appeal here allege that the 1972 amendments to the Longshoremen's and Harbor Worker's Compensation Act created a federal maritime negligence action, making removal proper as a federal question under § 1441(b). Both commentators and courts have rejected this analysis and found that removal of "savings clause" cases, which are based upon common law maritime negligence, is improper absent diversity of citizenship. *See Armstrong* v. *Alabama Power Co.*, 667 F.2d 1385, 1388 (11th Cir. 1982) ("[U]nder the reasoning of *Romero*, [v. *International Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959)] a federal district court should not accept the removal of a saving clause case solely because of its general maritime nature: the maritime nature simply does not provide a ground for federal jurisdiction."). *See also Giacona* v. *Capricorn Shipping Co.*, 394 F. Supp. 1189 (S.D. Tex. 1975); 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3674 (1985).

Clearly, the above reasoning was the basis of the district court's remand, making the remand jurisdictionally based and within the bounds of § 1447(c). Having found that the district court's remand order was based on grounds specified in § 1447(c) our review abruptly ends, for "Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court." *Thermtron*, 423 U.S. at 351, 96 S.Ct. at 593.

The petition for Writ of Mandamus is DENIED.

Appendix B

Order of District Court dated April 23, 1985

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

Civil Action No. CV 483-228

JOHNNY WARD,

Plaintiff,

v.

FIRESTONE TIRE AND RUBBER CO., A CORPORATION, OSWEGO LATEX CARRIER CORPORATION, M/V OSWEGO PLANTER, GEORGIA PORTS AUTHORITY, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1414 OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, SAVANNAH MARITIME ASSOCIATION,

Defendants.

Civil Action No. CV 483-229

LINDA WARD,

Plaintiff,

v.

FIRESTONE TIRE AND RUBBER CO., A CORPORATION, OSWEGO LATEX CARRIER CORPORATION, M/V OSWEGO PLANTER, GEORGIA PORTS AUTHORITY, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1414 OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, SAVANNAH MARITIME ASSOCIATION,

Defendants.

Appendix B—Order of District Court dated April 23, 1985

ORDER

Before the Court are motions by plaintiffs Johnny and Linda Ward to remand the above cases to the Superior Court of Chatham County, Georgia. The sole basis for plaintiffs' motions is their claim that these actions do not arise under the laws of the United States within the meaning of the removal statute, 28 U.S.C. §1441(b). The actions were originally filed in the Superior Court of Chatham County to recover for personal injuries sustained by plaintiff Johnny Ward while he was working as a longshoreman aboard the vessel M/V OSWEGO PLANTER. The action by plaintiff Linda Ward is a derivative suit to recover for loss of services caused by the injuries to her husband. The Court is well familiar with the facts of this case, having conducted an extensive trial in a limitation of liability action brought by the owner of the vessel. *In the matter of L&C. Marine Transport Ltd.*, Civil Action No. CV 481-476, *aff'd* No. 84-8303 (11th Cir. 1985).

Although plaintiffs seek to characterize their actions as arising solely under Georgia law, it is well settled that the 1972 amendments to the Longshoremen and Harbor Workers Compensation Act created a new federal cause of action for injuries sustained during the course of maritime employment. 33 U.S.C. §902; *Griffith* v. *Wheeling Pittsburgh Steel Corp.*, 610 F.2d 116, 129 (3rd Cir. 1979). Thus, 33 U.S.C. §905 provides the injured longshoreman with both a judicial and an administrative remedy against his employer. Under 33 U.S.C. §933, the longshoreman may also commence an action against a third party who may be responsible for the injury. These actions clearly arise under the laws of the United States. Accordingly, plaintiffs' motions to remand these actions are in all respects denied.

SO ORDERED, this 23rd day of April, 1985.

/s/ B. AVANT EDENFIELD
Judge, United States District Court,
Southern District of Georgia

Appendix C

Order of District Court dated May 21, 1985

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

CV483-197

JOHNNY WARD,

Plaintiff,

VS.

L. & C. MARINE TRANSPORT, LTD., FIRESTONE TIRE & RUBBER CO., OSWEGO LATEX CARRIER CORP., and MARINE TRANSPORT LINES, INC.,

Defendants.

CV483-198

LINDA WARD,

Plaintiff,

VS.

L. & C. MARINE TRANSPORT, LTD., FIRESTONE TIRE & RUBBER CO., OSWEGO LATEX CARRIER CORP., and MARINE TRANSPORT LINES, INC.,

Defendants.

Appendix C—Order of District Court dated May 21, 1985

CV483-228

JOHNNY WARD,

Plaintiff,

vs.

FIRESTONE TIRE AND RUBBER CO., A CORPORATION, OSWEGO LATEX CARRIER CORPORATION, M/V OSWEGO PLANTER, GEORGIA PORTS AUTHORITY, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1414 OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, SAVANNAH MARITIME ASSOCIATION,

Defendants.

and

CV483-229

LINDA WARD,

Plaintiff,

vs.

FIRESTONE TIRE AND RUBBER CO., A CORPORATION, OSWEGO LATEX CARRIER CORPORATION, M/V OSWEGO PLANTER, GEORGIA PORTS AUTHORITY, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1414 OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, SAVANNAH MARITIME ASSOCIATION,

Defendants.

ORDER

Pending before this Court are four actions concerning claims by plaintiffs Johhny Ward and Linda Ward, as husband and wife, for personal injury and other com-

pensatory damages asserted under the provisions of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), and relevant state law. These actions arose out of injuries sustained by Johnny Ward when he was struck by a flailing steel cable while attempting to rig a cargo boom on board the vessel *Oswego Planter*. Two of the four actions, specifically styled Johnny Ward v. Firestone Tire and Rubber Co., a corporation, Oswego Latex Carrier Corporation, M/V Oswego Planter, Georgia Ports Authority, International Longshoremen [sic] Association, Local 1414 of the International Longshoremen [sic] Association, Savannah Maritime Association, Civil Action No. 483-228, and Linda Ward against the same defendants, Civil Action No. 483-229, were removed to this Court from the State Court of Chatham County, Georgia by a petition filed on June 17, 1983. Also pending before the Court on that date was an action for exoneration from or limitation of liability filed on October 29, 1981, pursuant to the Limitation of Liability Act, 46 U.S.C. § 282, *et seq.* This latter action was brought by plaintiffs owners and charterers of the vessel *Oswego Planter, specifically,* L. & C. Marine Transport Ltd., as owner of the vessel on which Johnny Ward sustained personal injury while employed as a longshoreman, and Oswego Latex Carrier Corporation, as operator of the vessel *Oswego Planter,* and Firestone Tire & Rubber Company, as stockholder of L. & C., for the purpose of assuring that the liability for any damage attributable to the incident complained of in the state court actions, if found to have been occasioned without the privity or knowledge of the shipowner, would not exceed the value of the vessel *Oswego Planter,* together with her pending freight at the time of the incident.

According to provisions of the Limitation of Liability Act, if at the time the complaint is filed, the shipowner tenders to the court either a bond equal in value to the owner's interest in the vessel and freight, or that interest

itself, "all claims and proceedings against the owner with respect to the matter in question will cease." 46 U.S.C. § 185. In the instant case, a bond was tendered, and an injunction was entered staying all other proceedings, including the above referenced state court actions.

On May 25, 1983, plaintiffs Johnny Ward and Linda Ward filed their individual claims in the limitation proceeding. These remaining two of the four actions referred to previously are styled Johnny Ward v. L. & C. Marine Transport, Ltd., Firestone Tire & Rubber Company, Oswego Latex Carrier Corporation, and Marine Transport Lines, Inc., Civil Action No. 483-197, and Linda Ward against the same defendants, Civil Action No. 483-198. A non-jury trial of the limitation of liability action was commenced on January 30, 1984. Following the close of evidence on February 1, 1984, the Court granted plaintiffs' motion for involuntary dismissal with respect to Firestone Tire & Rubber Company and Marine Transport Lines, Inc., on the finding that claimants Johnny and Linda Ward failed to present sufficient evidence for the Court to pierce the corporate veils of the two parent companies so as to impose upon them liability that allegedly existed on the part of the subsidiary corporations. Moreover, by an Order entered on March 23, 1984, the Court found in favor of the remaining plaintiffs *in toto,* thereby exonerating them from any charge of negligence or claim of liability arising from the incident at issue. The claimants appealed this ruling, including the grant of the motion for involuntary dismissal of Firestore and Marine Transport. The Eleventh Circuit affirmed this Court's decision as to all issues by *L. & C. Marine Transport, Ltd.,* 755 F.2d 1457 (11th Cir. 1985). Accordingly, the Ward's claims in the limitation proceeding, namely, Civil Actions 483-198 and 483-197, have been adjudicated and found to be without merit.

At the same time, the two state court actions referred to previously as having been removed to this Court on June

17, 1983, were affected by the limitation of liability proceeding, as each of the four plaintiffs in the limitation action either were exonerated from liability or involuntarily dismissed from any claims arising from the incident at issue. These pending actions still contain unresolved issues of liability, however, notwithstanding the Court's Order of exoneration or involuntary dismissal of the vessel's owners and charterers, because such Order did not rule out the possibility that the remaining parties named as defendants in the state court actions acted negligently, and that such negligence proximately caused the incident at issue. Those remaining defendants include the International Longshoremen [sic] Association, Local 1414 of the International Longshoremen [sic] Association, and the Savannah Maritime Association.[1]

The Wards individually requested remand of these actions to the State Court of Chatham County, Georgia, by motions filed on June 27, 1983. Plaintiffs by their motions allege that their individual causes of action arise out of personal injuries sustained by a longshoreman, and the suits were instituted purposefully in a state court with demands for jury trials; plaintiffs contend that according to controlling decisions, such actions cannot be removed to federal court, citing *Calderola* v. *Eckert*, 332 U.S. 155 (1947); *Giaconi* v. *Capricorn Shipping Company*, 394 F. Supp. 1189 (S.D.Tex. 1975); *Rain* v. *Compania Maritime Belge S.A.*, 318 F. Supp. 319 (S.D.N.Y. 1970). Defendants responded to this motion by contending, essentially, that the 1972 amendments to the Longshoremen's and Harbor Worker's Compensation Act, which is the statutory basis for plaintiff husband's claim, created a new federal cause

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[1] Georgia Ports Authority also was named as a defendant in the state court actions; however, it has been represented to this Court both orally by counsel for plaintiffs and by lack of pleading on behalf of this defendant that it was dismissed from these actions prior to their removal to this Court.

of action "arising under" the laws of the United States, thereby according jurisdiction on this Court.[2]

The Court having knowledge of the facts underlying this dispute, as a consequence of having tried the limitation of liability action, sought to exercise judicial economy by maintaining and resolving the outstanding issues in these actions in the forum in which they were pending following their removal. Accordingly, the Court entered an Order on April 29, 1985 denying plaintiffs' motions for remand to the state court. However, upon *sua sponte* reconsideration, the Court hereby finds it necessary to vacate that Order and remand these actions, for the following reasons.

First, the Court recognizes that district courts have original jurisdiction, exclusive of the state courts, in "[a]ny civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*" 28 U.S.C. § 1333 (emphasis added). It is not disputed that plaintiff husband's claim is maritime in nature, and therefore concerns a subject accorded federal jurisdiction. Essentially, however, plaintiffs seek damages resulting from the alleged negligence of the named parties, and for plaintiff wife's consequential loss of consortium. Significantly, for purposes of the "saving to suiters" clause, the "tort action for negligence was not derived from a federal statute [, as defendants contend,]

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[2] As an incidental matter, the Court reminds the parties that removal jurisdiction is purely derivative of state court jurisdiction. *Minnesota* v. *United States*, 305 U.S. 382, 389 (1939). "Where the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although in a like suit originally brought in a federal court it would have had jurisdiction." *Id.* (citations omitted); *McRory* v. *Hobart Bros. Co., Inc.*, 732 F.2d 1533, 1535 (11th Cir. 1984). Accordingly, whether a federal court has exclusive jurisdiction to entertain a particular claim is not a proper issue for defendants to raise in response to a motion for remand.

but from the general maritime law," *Giacona* v. *Capricorn Shipping Co.*, 394 F. Supp. 1189, 1191 (S.D.Tex. 1975), and the loss of consortium claim is merely a derivative of it, under state law. *Clark* v. *Wright*, 137 Ga. App. 720, 722 (1976). Negligence asserted under general maritime law and loss of consortium asserted under state law are common law remedies, rather than causes of action "arising under" the Constitution, laws, or treaties of the United States.

Persons bringing such common law actions in state court would be entitled to a trial by jury. In that connection, according to the explicit mandate of Congress in the "saving to suitors clause," plaintiffs must not be thwarted in their attempt to employ their common law remedies in state court, where a trial by jury may be obtained. *Lake Tankers Corp.* v. *Henn*, 354 U.S. 147, 153 (1956).

Thus, because plaintiffs initially brought their claims in state court, and asserted individually their right to trial by jury, the Court is without power under the "saving to suitors clause" to deny them this right in the federal forum. *See Bynum* v. *Patterson Truck Lines, Inc.*, 655 F.2d 643, 644 (5th Cir. Unit A 1981) (in a claim filed in federal court under 33 U.S.C. § 905(b) and based on maritime jurisdiction, there is no right to a jury trial).

Accordingly, the Clerk of this Court is instructed to vacate the Court's Order entered on April 29, 1985, and remand these actions, namely, Civil Actions 483-228 and 483-229, to the State Court of Chatham County, Georgia. The Clerk is further instructed to dismiss Civil Actions 483-198 and 483-197, with prejudice.

So Ordered, this 21 day of May, 1985.

/s/ B. Avant Edenfield
Judge, United States District Court
Southern District of Georgia

Supreme Court, U.S.
FILED
NOV 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-649

In The
Supreme Court of the United States
October Term, 1985

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 1414, and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

vs.

JOHNNY WARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO REVIEW

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QUESTION PRESENTED FOR REVIEW

The Petitioners have framed their Question Presented for Review as whether a claim brought under the Longshoremen's and Harbor Workers' Compensation Act, 29 U.S.C. §§ 905(b), 933 arises under the laws of the United States within the meaning of 28 U.S.C. § 1441(b), so as to be heard in federal court without regard to the citizenship of the parties.

It appears to the Respondent that the Petitioners have incorrectly framed the legal issue. Respondent concedes that 29 U.S.C. §§ 905, 933 provides a casue of action under federal law. However, the true question for review would seem to be:

Are a longshoreman's state common law causes of action against a defendant other than a vessel, when joined with a cause of action against the vessel under the Longshoremen's and Harbor Workers' Compensation Act, 29 U.S.C. §§ 905, 933, not remandable to the state court under the "saving to suitors" clause of 28 U.S.C. § 1333 (1) when the action under the Longshoremen and Harbor Workers' Compensation Act have been extinguished by exoneration?

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO REVIEW

STATEMENT OF THE CASE

Respondent JOHNNY WARD was a longshoreman who was injured aboard the M/V OSWEGO PLANTER

on May 26, 1981. Respondent WARD and his wife filed suits in the Superior Court of Chatham County, Georgia, on September 25, 1981, claiming negligence on the part of the vessel interests under 33 U.S. Code § 905(b). Both WARD and his wife also filed suit against several other named defendants, including the petitioners for the instant writ, alleging causes of action under Georgia law. Owners and operators of the ship filed a Petition for Exoneration from or Limitation of Liability, pursuant to 46 U.S. Code §§ 183-189, in the United States District Court for the Southern District of Georgia following removal of the two suits to that forum.

The exoneration/limitation proceeding went to trial before the District Court, sitting without a jury, on January 30, 1984 and was completed on February 2, 1984.

On March 23, 1984, the District Court rendered comprehensive finding of fact and conclusions of law, ruling that there was no negligence on the part of the vessel interests under the applicable legal standard set forth by this Honorable Court in *Scindia Steam Navigation Co. v. Santos,* 451 U.S. 156 (1981), and subsequent appellate decisions based on *Scindia.*

The Respondent WARD and his wife had previosuly moved to remand their causes of action brought under state law back to the state court. On May 21, 1985, the district court remanded the two actions to the state court, finding that their claims against the remaining defendants including the petitioners here, were not derived from a federal statute as the petitioners here contend, but were asserted as negligence claims under general maritime law and under state common law. The district court decided that under the "savings to suitors" clause of 28 U.S.C.

§ 1333 that the plaintiffs-respondents should not be thwarted in their desire to have their common law actions heard in the original state court where trial by jury could be had.

The Petitioners then filed for a Writ of Certiorari with this Court.

———o———

SUMMARY OF THE ARGUMENT

Petitioners seem to argue that once a plaintiff joins any state cause of action with an action under the Longshoremen and Harbor Workers' Compensation Act, the two distinct causes of action "merge" and become one action, federal in nature, subject only to a hearing in a federal district court. This is simply incorrect. It seems that the Petitioners' error is in believing that state common law actions for negligence are swallowed up by an action brought against a vessel under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) and that even when suit against the vessel is extinguished by exoneration, the state actions remain converted into federal claims.

In truth, once a federal claim is extinguished leaving only state common law negligence actions, it is only proper that these state claims be heard in the state court where originally filed and where a trial by jury may be had. Once Respondent WARD's federal cause of action was decided by the federal district court, leaving the Respondent with only his state common law negligence actions remaining, the case was correctly remanded to the state court under 28 U.S.C. § 1333 (1) which declares that:

> The district courts shall have original jurisdiction exclusive of the courts of the States of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.* (Emphasis supplied).

Petitioners' argument that an action under the Longshoremen's and Harbor Workers' Compensation Act is one distinctly federal in character arising under the laws of the United States so as to come within the original jurisdiction of the federal district courts and thus be properly removable, simply "misses the boat." It matters not whether a claim brought under § 905(b) of the LHWCA arises under the laws of the United States, because there no longer exists such a claim by the plaintiff-respondent. Only state causes of action remain for the plaintiff-respondent to pursue, and the district court rightfully decided these causes of action could best be heard by the state court where the plaintiff-respondent would also receive a trail by jury. .

ARGUMENT

Respondent WARD'S original complaint was brought under a 1972 amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b):

> In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, *may bring an action against such vessel* as a third party in accordance with the provisions of section 33 of this Act [33 USCS § 933], and the employer shall not be liable to the vessel for

> such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hoc vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. *The remedy provided in this subsection shall be exclusive of all other remedies against the vessel* except remedies available under this Act. (Emphasis supplied.)

The complaint was also brought under Georgia common law negligence. A number of defendants were named, but all the defendants named liable by reason of being affiliated with the vessel were exonerated from liability, leaving the Petitioners as the only defendants left named in the surviving action, none of whom are sued under the above-cited statute as none are affiliated with the vessel upon which the Respondent was injured.

Once there had occurred exoneration for the vessel, the district court, *sua sponte*, remanded the remaining state causes of action to the state court under the "saving to suitors" clause of 28 U.S.C. § 1333 (1). *Supra.* Jurisdiction of the state law actions was best had by the state court where the claim was originally filed and where the plaintiff [Respondent] could receive his requested trial by jury.

Indeed, once the federal district court had extinguished by exoneration the claims brought under 33 U.S.C. 905(b) and released all defendants but the Petitioners, there was no claim arising under the laws of the United States pursuant to 28 U.S.C. § 1441(b) for the Court to hear (and the Petitioners have conceded in their petition that complete diversity under the same statute was lacking). Thus, any basis for federal jurisdiction had disappeared. If removal was proper, but the claim or party that was the basis for jurisdiction was eliminated from the case, it is discretionary with the Court whether to hear other claims presented by the case or to remand the remaining claims and parties. *Watkins v. Grover,* 508 F.2d 920 (9th Cir. 1974); *Brough v. United Steelworkers of America, AFL - CIO,* 437 F.2d 748 (1st Cir. 1971).

Therefore, for all the above reasons, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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